



DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1952

[Docket ID. OSHA 2014-0019]

RIN 1218-AC92

Arizona State Plan for Occupational Safety and Health

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Proposed rejection of State initiated plan change; reconsideration of final approval of State plan; and request for written comments.

SUMMARY: The Occupational Safety and Health Act requires state plans to provide safety standards “at least as effective as” those of federal OSHA. The legislature of Arizona enacted a fall protection standard for residential roofing that provides fall protection at heights above 15 feet, while that of OSHA provides protection to workers at 6 feet. OSHA is proposing to take action to require Arizona to revise its standard to provide equivalent protection. OSHA is initiating two concurrent administrative proceedings which would officially reject Arizona’s fall protection standard, and rescind the “final approval” status of the Arizona state plan in the construction industry, to allow OSHA to enforce federal construction safety standards pending enactment by Arizona of an “at least as effective” fall protection standard. OSHA is soliciting written comments to ensure that all relevant information, views and data are available to the Assistant Secretary. If requested, a public hearing may be held on these issues.

DATES: Comments and requests for a hearing must be received by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

ADDRESSES: Written comments: Submit comments, identified by docket number OSHA-2014-0019, or regulatory information number (RIN) 1218-AC92, by any of the following methods:

Electronically: Submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions on-line for making electronic submissions; or

Fax: If your submission, including attachments, does not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693-1648; or

U.S. mail, hand delivery, express mail, messenger or courier service: Submit your comments and attachments to the OSHA Docket Office, Docket Number OSHA-2014-0019, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW, Washington, DC 20210; telephone (202) 693-2350 (OSHA's TTY number is (877) 889-5627). Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. - 4:45 p.m., EDT.

Instructions for submitting comments: All submissions must include the docket number (Docket No. OSHA-2014-0019) or the RIN number (RIN 1218-AC92) for this rulemaking. Because of security-related procedures, submission by regular mail may result in significant delay. Please contact the OSHA Docket Office for information about security procedures for making submissions by hand delivery, express delivery and messenger or courier service.

All comments, including any personal information you provide, are placed in the public docket without change and will be made available online at <http://www.regulations.gov>. Therefore, OSHA cautions you about submitting personal information such as social security numbers and birthdates.

Docket: To read or download submissions in response to this Federal Register notice, go to docket number OSHA-2014-0019, at <http://www.regulations.gov>. All submissions are listed in the <http://www.regulations.gov> index, however some information (e.g., copyrighted material) is not publicly available to read or download through that webpage. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

Electronic copies of this Federal Register document are available at <http://www.regulations.gov>. This document as well as news releases and other relevant information, is available at OSHA's Webpage at <http://www.osha.gov>. A copy of the documents referenced in this notice may also be obtained from the OSHA Docket Office, at the address above. Other information about the Arizona State Plan is posted on the state's Website at http://www.ica.state.az.us/adosh/adosh_main.aspx.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Mr. Francis Meilinger, OSHA Office of Communications, Room N-3647, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210; telephone: (202) 693-1999; email: meilinger.francis2@dol.gov.

For general and technical information: Mr. Douglas J. Kalinowski, Director, OSHA Directorate of Cooperative and State Programs, Room N-3700, U.S. Department

of Labor, 200 Constitution Avenue, NW, Washington DC 20210; telephone: (202) 693-2200; email: kalinowski.doug@dol.gov.

SUPPLEMENTARY INFORMATION:

Background

Arizona State Plan

Arizona administers an OSHA-approved State Plan to develop and enforce occupational safety and health standards for public and private sector employers, pursuant to the provisions of Section 18 of the Williams-Steiger Occupational Safety and Health Act of 1970 (29 U.S.C. 667) (“the Act”). The Arizona State Plan received initial federal OSHA plan approval on November 5, 1974 (39 FR 39037), and the Arizona Occupational Safety and Health Division (ADOSH) of the Industrial Commission of Arizona is designated as the state agency responsible for administering the State Plan. Pursuant to Section 18(e) of the Act, OSHA granted Arizona “final approval” effective June 20, 1985 (50 FR 25561). Final approval under Section 18(e) requires, among other things, a finding by the Assistant Secretary that the plan, in actual operation, provides worker protection “at least as effective as” that provided by federal OSHA. A final approval determination results in the relinquishment of federal concurrent enforcement authority in the state with respect to occupational safety and health issues covered by the plan (29 USC 667(e)).

OSHA’s Residential Construction Fall Protection Standard

On November 25, 1986, OSHA proposed to revise the federal construction fall protection standard. The rulemaking record, developed over a nine-year period, resulted in a more performance-oriented rule, issued on August 9, 1994 (29 CFR part 1926,

subpart M, 59 FR 40672). In general, the rule requires that an employee exposed to a fall hazard at a height of six feet or more must be protected by conventional fall protection, meaning equipment that prevents or arrests the fall.

In response to feasibility issues about the rule raised by the residential construction industry, on December 8, 1995, OSHA issued interim fall protection procedures (STD 3.1) for residential construction employers that differ from those in the rule. OSHA Instruction STD 03-00-001 (a plain language rewrite and renumbering of STD 3.1) set out an interim compliance policy that permitted employers engaged in certain residential construction activities to use specified alternative procedures instead of conventional fall protection. These alternative procedures could be used without a prior showing of infeasibility or greater hazard and without a written, site-specific fall protection plan, requirements which apply to exceptions from the general requirement to use conventional fall protection in other construction sectors. OSHA never intended STD 03-00-001 to be a permanent policy; in issuing the Instruction, OSHA stated that the guidance provided therein would remain in effect until further notice or until completion of a new formal rulemaking effort addressing these concerns.

On July 14, 1999, OSHA published an Advanced Notice of Proposed Rulemaking (ANPR) (64 FR 38078) seeking comments and data on claims of infeasibility of fall protection requirements for certain construction activities, which marked the start of its evaluation of STD 03-00-001. In the ANPR, OSHA stated that the fall protection requirements of subpart M were already established as reasonably necessary and appropriate to protect workers and as technologically and economically feasible for employers. OSHA noted that since the promulgation of Subpart M, there had been

advances in the types and capability of commercially available fall protection equipment and therefore, OSHA intended to rescind STD 03-00-001 unless persuasive evidence of infeasibility or significant safety hazard was presented. OSHA was willing to consider, and sought additional information on, specific concerns raised by employers engaged in certain residential construction activities.

After considering all comments submitted on the record, OSHA concluded that, overall, there was no persuasive evidence that most residential construction employers would be unable to find a safe and feasible means of protecting workers from falls in accord with Subpart M, 29 CFR 1926.501(b)(13). Therefore, on December 16, 2010, OSHA's Compliance Guidance for Residential Construction (STD 03-11-002) canceled OSHA's interim enforcement policy (STD 03-00-001) on fall protection for certain residential construction activities, and required employers engaged in residential construction to fully comply with 29 CFR 1926.501(b)(13). This new guidance informed State Plans that, in accordance with the Act, they must each have a compliance directive on fall protection in residential construction that, in combination with applicable State Plan standards, resulted in an enforcement program that is at least as effective as federal OSHA's program (75 FR 80315, Dec. 22, 2010).

Arizona's Residential Construction Fall Protection Standard

On June 16, 2011, ADOSH adopted STD 03-11-002, but on June 17, 2011, the Industrial Commission of Arizona (ICA) immediately stayed the enforcement of this directive. Then on November 30, 2011 the ICA lifted the stay, effective January 1, 2012. On March 27, 2012, a new law, SB 1441, was signed into legislation, requiring conventional fall protection in residential construction whenever an employee is working

at a height of fifteen or more feet or whenever a roof slope is steeper than 7:12, and creating an exception if implementation of conventional fall protection is “infeasible or creates a greater hazard.” SB 1441 was codified as Arizona Revised Statute, Title 23, Ch. 2, Art 13 (A.R.S. 23-492), which sets forth fall protection requirements for residential construction work in the state. ADOSH then adopted the requirements of A.R.S. 23-492 as a state standard (Ariz. Admin. Code R20-5-601.01). On April 22, 2014, a new law, SB 1307, which makes certain revisions to A.R.S. 23-492, was signed into law. This revised version of the state statute makes some relatively minor changes to its fall protection requirements, does not alter the 15-foot height for conventional fall protection, and contains a conditional repeal provision.

The OSH Act requires State Plans to have standards that are at least as effective as federal OSHA’s standards (29 USC 667(c)(2)). In most instances, state standards are adopted by the designated state occupational safety and health agency, and are forwarded to OSHA as supplements to the State Plan (29 CFR 1953.4). In this instance, however, the legislature itself provided the standard (Ariz. Admin. Code R20-5-601.01).

Accordingly, the State Plan supplement at issue in this Federal Register document is referred to as the “state statute” rather than “standard” or “supplement,” the terms used in OSHA’s procedural regulations.

Steps Prior to this Document

Following an extensive review of the Arizona statute, on December 7, 2012, OSHA sent a letter to ADOSH stating that federal OSHA has determined that the state statute is not at least as effective as the federal equivalent in ensuring protection of residential construction workers. Since that time, OSHA has held numerous meetings

and phone calls with Arizona stakeholders, ADOSH and the Industrial Commission of Arizona, which oversees ADOSH. The OSHA National Office in Washington, DC also spoke with staff from the Governor's Chief of Staff at the end of 2013 to express OSHA's concerns about the state statute.

Pursuant to 29 CFR 1953.6(e), OSHA sent Arizona a letter to show cause why a proceeding to reject the state statute and reconsider the State's Final Approval Status should not be commenced, on March 19, 2014. That letter gave the State 30 days to respond, a time subsequently extended to one week after the 2014 Arizona legislative session adjourned. On May 1, 2014, Arizona submitted its response. The response letter pointed to the passage of SB 1307, which is discussed below. The response letter also argued that because SB 1307 would be effective in late July 2014, the instant proceeding to reject A.R.S. 23-492 was moot. OSHA does not agree. The changes to A.R.S. 23-492 implemented by SB 1307 are limited, and OSHA has considered the substance of those changes in this notice. Moreover, the main provisions of A.R.S. 23-492 which are the basis for OSHA's proposed rejection of the state statute, including the 15-foot trigger height for conventional fall protection, remain in both the old and new versions of the state statute. Additional arguments in the response letter address the merits of whether Arizona's statute is at least as effective as the federal fall protection standard. As explained below, OSHA does not believe that either the original or revised statute is at least as effective as the federal standard, and thus OSHA continues to believe that there is cause to commence a proceeding to reject the state statute and reconsider the State's Final 18(e) Approval Status.

Comparison of OSHA and Arizona’s Residential Construction Fall Protection Standards: How Arizona is not at Least as Effective as OSHA

Federal OSHA’s standard for fall protection in residential construction (29 CFR 1926.501(b)(13)) generally requires conventional fall protection (fall arrest systems, safety nets, or guardrails) any time employees are working at heights of six feet or greater. Alternative fall protection measures may be used only if the employer can demonstrate that it is infeasible or creates a greater hazard to use the specified methods of conventional fall protection (29 CFR 1926.501(b)(13); *see also* STD 03-11-002).

OSHA’s standard creates a presumption that use of conventional fall protection is feasible and would not create a greater hazard, and puts the burden on employers to show otherwise (29 CFR 1926.501(b)(13)). In the limited circumstances in which conventional fall protection is infeasible or creates a greater hazard, federal OSHA requires the employer to implement a written, site-specific fall protection plan that specifies the alternative measures that will be taken to eliminate or reduce the possibility of a fall (29 CFR 1926.501(b)(13); STD 03-11-002).

In contrast, Arizona’s fall protection standard, under the statute passed in 2012, requires very limited, if any, fall protection for employees working between six and fifteen feet. With respect to work performed at heights of 15 feet or greater, Arizona’s statute has a provision requiring the use of conventional fall protection unless the employer demonstrates that the use of such measures is infeasible or creates a greater hazard (A.R.S. 23-492.02(A)). Arizona’s law does require a fall protection plan, but unlike federal OSHA, which requires fall protection plans to be site-specific, Arizona allows employers to “develop a single fall protection plan covering all construction operations” for work performed at heights below fifteen feet (A.R.S. 23-492.07(A)(1)).

Additionally, Arizona's statute contains multiple exceptions to the general requirement for conventional fall protection that will result in many circumstances in which conventional fall protection is not required (A.R.S. 23-492.02(B); 23-492.04(D)(1) and (D)(2); 23-492.04(G)(2); and (G)(3)). It also allows alternative fall protection to be used, i.e. slide guards and roof jack systems, in certain circumstances (A.R.S. 23-492.04(G)(1)(b); 23-492.05(B)).

Arizona's fall protection statute, newly revised in 2014, continues to require very limited, if any, fall protection for employees working between six and fifteen feet. At those heights, the statute continues to require only a fall protection plan, which can be a single plan for all sites. (SB 1307 Sec. 5(A)(1)). The newer version of the statute, like the older one, requires conventional fall protection at a height of 15 feet, and allows an exemption if that fall protection is infeasible or creates a greater hazard (Sec. 2(A)). Though the revised statute does eliminate some exemptions to and alternative methods of fall protection, it still allows other exemptions to conventional fall protection, SB 1307 Sec. 1(6) and Sec. 3(G)(2), and allows the use of other alternative methods, i.e. "eave barriers" and parapet walls (Secs. 3(G)(1), 4(A) and 4(B)).

After reviewing the provisions of both versions of the state statute, OSHA has concluded that the Arizona statute is not at least as effective as OSHA's standard. The most notable problematic differences being Arizona's 15 foot trigger height for using conventional fall protection as opposed to OSHA's six foot trigger height, the single fall protection plan for all worksites, and the exceptions to the requirement for conventional fall protection. On the basis of these concerns about the state statute, OSHA is initiating

a proceeding to reject the state statute and reconsider the State Plan's Final Approval, and requests public comment.

Proposed Rejection of Arizona's State Statute and Reconsideration of Final Approval of the State Plan

This document proposes to reject the Arizona Revised Statute 23-492, including the revisions in SB 1307, and concurrently reconsider the Arizona State Plan's Final Approval pursuant to 29 CFR 1953.6(e) and 29 CFR 1902.47 et seq., respectively. OSHA is moving forward with both processes simultaneously with the understanding that reconsideration of final approval is contingent on successful rejection of the state statute.

Arizona must have an enforcement program for residential fall protection that is at least as effective as OSHA's. As explained in STD 03-11-002:

States with OSHA-approved State Plans must have a compliance directive on fall protection in residential construction that, in combination with applicable State Plan standards, results in an enforcement program that is at least as effective as Federal OSHA's program. State plans must adopt the interpretation of "residential construction" and the citation policy described in paragraphs IX and X of this Instruction or an at least as effective alternative interpretation and policy.

SB 1307 contains a conditional repeal provision stating that if OSHA does reject the state statute, and publishes that decision in the Federal Register pursuant to 29 CFR 1902.23, then A.R.S. 23-492 is repealed by operation of law (Sec. 7). Arizona's response to OSHA's show cause letter argued that if the state statute is repealed, ADOSH would revert to enforcing 29 CFR part 1926, Subpart M, thus OSHA does not need to proceed on reconsideration of the State's final approval status. OSHA will proceed with reconsideration as a part of the proceeding to reject the Arizona statute. If rejection is successful, this would establish the basis for OSHA to reconsider the State's final approval status if the State does not implement and enforce 29 CFR part 1926, Subpart M

and STD 03-11-002, or an at least as effective alternative, in an at least as effective manner. The lack of any such implementation or enforcement would leave a gap in the State's enforcement program, but if the State retained its final approval, neither the State nor federal OSHA could cover that gap. Any such gap in the State Plan's enforcement program would serve as the basis for the Assistant Secretary's reconsideration of 18(e) final approval status. But as explained below, the Assistant Secretary may stagger the decisions on rejection and reconsideration, issuing a rejection decision first, and if it is successful, then delaying the decision on reconsideration to allow the state time to implement and begin enforcement of STD 03-11-002.

The Extent of OSHA's Coverage if Arizona's Final Approval is Reconsidered

While the issue at hand is limited to fall protection in residential construction, it may not be possible or practical to limit federal coverage this narrowly, and it would likely extend to all aspects of construction, including residential, throughout the state. First, limiting federal coverage to fall protection is not efficient or effective because once an inspector is on a worksite, he or she is obligated to inspect all aspects of the site. For example, if a federal inspection is initiated in response to a reported fall hazard, but electrical, chemical, or equipment hazards are observed, those hazards would need to be addressed immediately. It would be impractical to contact ADOSH and have two agencies devoting resources to conduct two inspections at the same site.

Second, limiting federal coverage to residential construction may not be feasible or effective because it is not always possible, with simple visual observation of a site, to tell if a structure under construction is a residence or a business. It may be necessary to interview individuals at the site, investigate building permits, or find other information

before that determination can be made. It would not be effective or efficient for an inspector to make these efforts, determine that a site is not residential, and then leave to conduct work elsewhere.

Third, it may be problematic for the regulated public to have federal OSHA enforcing requirements in residential construction while the state enforces in the rest of the construction sector. The two agencies have different inspection procedures, penalty assessments, and appeals processes. Many individual contractors work on both residential and commercial construction projects, and it would be preferable to avoid oversight by multiple agencies, if possible.

Fourth, there also may be issues in reconciling the federal definition of residential construction in STD 03-11-002, and the uncertainty of a definition of residential construction in Arizona. For this reason, it may be difficult to come to an agreement about which sites fall under residential construction and which are general construction.

Operational Status Agreement

OSHA regulations provide that in states with initially-approved plans, OSHA and the state may enter into an agreement describing the division of responsibilities between them (29 CFR 1954.3). If the Assistant Secretary were to make a final decision on reconsideration to revoke final approval for construction, federal authority for discretionary concurrent enforcement would resume, and it may be useful for OSHA and ADOSH to develop an Operational Status Agreement (OSA) specifying the level of federal and state enforcement. The OSA would also include a timetable for remedial action to make state operations “as least as effective.” Notice would be provided in the Federal Register of any such agreement.

Procedures for the Proceeding and Hearing

OSHA's regulation on rejection of a State Plan Change, 29 CFR 1953.6(e), refers to procedures in 29 CFR 1902.17 et seq. Then 29 CFR 1902.19, in turn, refers to the procedures in 5 USC 556-557. OSHA's regulations on reconsideration of State Plan status, 29 CFR 1902.47 et seq., refer to procedures in 29 CFR 1902.40 for a hearing. These two sets of procedures (5 USC 556-557 and 29 CFR 1902.40) are similar, and OSHA will adhere to the procedural requirements in both sets of procedures. OSHA sent Arizona a letter to show cause why a proceeding to reject the State statute and reconsider the state's Final Approval Status should not be commenced, per 29 CFR 1953.6(e). This notice sets forth a 35-day comment period, pursuant to 29 CFR 1902.49, to provide interested parties an opportunity to provide in writing, data, views and arguments on the proposed rejection of the Arizona statute and proposal to reconsider final approval. Relevant materials, including all public comments, relevant federal monitoring reports, and other pertinent documentation will be publically available in OSHA's Docket Office and on www.regulations.gov, as described above. At the close of the public comment period, OSHA will review all comments submitted.

A hearing would be presided over by an Administrative Law Judge (ALJ), and the pre-hearing procedure may include opportunities for subpoenas, depositions, and settlement conferences, within the discretion of presiding ALJ (5 U.S.C. 556(c)). The ALJ may entertain motions and may dispose of procedural requests, objections, and comparable matters (29 CFR 1902.40(c)(2)). Under the rules of the Department of Labor's Office of Administrative Law Judges, the ALJ also has discretion on the rules for the proceeding (29 CFR 18.1(b)). The hearing itself would include the presentation of

testimony, cross-examination of witnesses, and the introduction of exhibits, by both parties (5 U.S.C 556(d)). A hearing transcript would be created, and ultimately, OSHA would have the burden of proof (5 U.S.C. 556(d)). At the conclusion of any hearing, participants in the hearing would have the opportunity to submit proposed findings, along with supporting reasons and any additional data, views, or argument, within a period of thirty days (29 CFR 1902.19 and 1902.40(c)(6)).

Assuming Arizona does not waive the tentative decision, the Assistant Secretary will issue a tentative decision, on the basis of the whole record, either approving or disapproving the state's statute (29 CFR 1902.21). This tentative decision will include a statement of the findings and conclusions that form the basis of this decision and it will be published in the Federal Register (29 CFR 1902.21). Interested persons participating in the hearing would then have the opportunity to file exceptions, and objections to those exceptions. Any exceptions must be filed within thirty days of the tentative decision, and the objections within a period of time set forth in the tentative decision (29 CFR 1902.22). Subsequently, the Assistant Secretary will issue a final decision ruling on each exception and objection and publish such decision in the Federal Register (29 CFR 1902.22-23). This publication of the final decision in the Federal Register may also include the Assistant Secretary's decision on the continuation or revocation of the Arizona State Plan's affirmative 18(e) determination, per 29 CFR 1902.52-53, or the two decisions may be issued on a staggered basis. If the Assistant Secretary's decision is to revoke the affirmative 18(e) determination, the Federal Register notice containing that decision will also reflect the Assistant Secretary's determination that concurrent federal enforcement and standards authority will be reinstated within Arizona for a reasonable

time until the Assistant Secretary has either withdrawn approval, or partial approval, of the plan pursuant to 29 CFR 1955, or has determined that Arizona has once again met criteria for final approval under section 18(e), (29 CFR 1902.52).

Pursuant to the regulations cited above, modifying the Arizona State Plan's status from final to initial approval would give OSHA concurrent enforcement authority in Arizona, including independent federal or joint state and federal inspections resulting in issuance of appropriate federal citations. However, modifying Arizona's final approval status would not immediately affect Arizona's basic plan approval and would not eliminate Arizona's legal authority to enforce state occupational safety and health standards. Pending a final decision in the proceeding instituted today, OSHA will continue to exercise federal authority over safety and health issues excluded from the scope of coverage of the State Plan; monitoring inspections including accompanied visits; and other federal authority not affected by the June 20, 1985 final approval decision.

AUTHORITY AND SIGNATURE:

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C., 20210 authorized the preparation of this notice. OSHA is issuing this notice under the authority specified by Section 18 of the Occupational Safety and Health Act of 1970 (29 USC 667), Secretary of Labor's Order No. 1-2012 (77 FR 3912), and 29 CFR parts 1902, and 1953.

Signed at Washington, DC, on August 13, 2014.

David Michaels,
Assistant Secretary of Labor for Occupational Safety and Health.

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